IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1579

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
Petitioners

v.

PEPI, INC., PHILIPS ELECTRONICS INSTRUMENTS, INC. and NORTH AMERICAN PHILIPS CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The petitioners Arthur H. Pitchford and Pitchford Scientific Instruments Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 24, 1975.

OPINION BELOW

The opinion of the Court of Appeals appears at Civil Nos. 75-1136 and 75-1137 (3d Cir., filed December 24, 1975) and in 1975-2 Trade Cases ¶60,653. It is set forth in full in the Appendix to this petition. No opinion was rendered by the District Court for the Western District of Pennsylvania.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 24, 1975. A timely petition for rehearing *en banc* was denied on January 30, 1976, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit has been engaged in a systematic destruction of the private antitrust action in contravention of the express policy of the antitrust laws.

2. Whether the decision of the Court of Appeals for the Third Circuit conflicts with the decisions of this Court and other Courts of Appeals as to the standards to be applied in private antitrust suits.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 15
§1, Sherman Act

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

UNITED STATES CODE, TITLE 15
§14, Clayton Act

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

UNITED STATES CODE, TITLE 15

§15, Clayton Act

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

In 1945, Arthur H. Pitchford was appointed the first dealer for Philips products in the United States. (R. 777a)[1] In 1960, Arthur H. Pitchford incorporated his business under the name Pitchford Scientific Instruments Corporation and continued to sell respondents' scientific, analytical and industrial x-ray equipment under a series of annual contracts with Philips Electronics Instruments (PEI), a division of Pepi, Inc. (R. 795a).

By letter dated August 6, 1970, PEI terminated Pitchford Scientific's dealership for all products effective September 10, 1970.

On December 24, 1970, Arthur H. Pitchford and Pitchford Scientific filed suit in the United States District Court for the Western District of Pennsylvania against Pepi, Inc., alleging violations of Section 1 of the

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1. Record references are to the Appendix as filed with the Court of Appeals and cited R. ....a. References to the opinion of the Court of Appeals are cited as Opinion, p. ....a.

Sherman Act, 15 U.S.C. §1, Section 3 of the Clayton Act, 15 U.S.C. §14, fraud and unconscionability. Jury trial commenced on February 26, 1974. North American Philips Corporation (NAP) and Philips Electronic Instruments (PEI) were added as additional defendants prior to trial following defendants' disclosure that Pepi, Inc. had been merged into NAP and a separate corporation, PEI, had been spun out to handle the further manufacture and sale of the relevant products. Defendants' motions for directed verdict on the antitrust counts were denied, and the issues of territorial restrictions, price fixing, illegal tying arrangements (full line forcing) and anticompetitive restrictive dealing were presented to the jury on special interrogatories.

On March 29, 1974, the jury returned its verdict, awarding plaintiffs a total of $825,000. The jury answered the special interrogatories as follows:

I. Did defendant, during the period from December 24, 1966 until September 10, 1970, engage in any conduct which caused actual pecuniary loss to Pitchford Scientific Instruments Corporation:

(a) By preventing Pitchford Scientific Instruments Corporation from selling Philips products in territory in which Pitchford Scientific Instruments Corporation would otherwise have sold?

Answer: Yes

(b) By preventing Pitchford Scientific Instruments Corporation from selling Philips products at prices at which Pitchford Sci-

entific Instruments Corporation would otherwise have sold?

Answer: Yes

(c) By preventing Pitchford Scientific Instruments Corporation from selling products it wanted to sell or requiring it to sell products it did not want to sell?

Answer: Yes

II. If the answer to I(a), I(b) or I(c) is yes, what actual pecuniary loss, if any, was suffered by Pitchford Scientific Instruments Corporation?

Amount: $550,000.00

III. (a) Did Arthur H. Pitchford as an individual suffer any actual pecuniary loss between December 24, 1966 and September 10, 1970 to which any of the factors specified in I(a), I(b), or I(c) above substantially contributed?

Answer: Yes

(b) If answer to III(a) is yes, state amount of such loss?

Amount: $72,000.00

IV. Did the termination to plaintiff's dealership on September 10, 1970 result in any actual pecuniary loss to Pitchford Scientific Instruments Corporation to which any of the following were substantial contributing factors:

(a) By preventing Pitchford Scientific Instruments Corporation from selling Philips products in territory in which Pitchford

Scientific Instruments Corporation would otherwise have sold?

Answer: Yes

(b) By preventing Pitchford Scientific Instruments Corporation from selling Philips products at prices at which Pitchford Scientific Instruments Corporation would otherwise have sold?

Answer: Yes

(c) By preventing Pitchford Scientific Instruments Corporation from selling products it wanted to sell or requiring it to sell products it did not want to sell?

Answer: Yes

V. If answer to IV(a), IV(b) or IV(c) is yes, state amount of such loss?

Amount: $203,000.00

VI. Were legitimate business reasons (such as poor performance) a predominantly contributing factor to termination of Pitchford Scientific Instruments Corporation's dealership on September 10, 1970?

Answer: No

On April 2, 1975, the District Court entered judgment against defendants in the amount of $2,475,000. Following the submission of memoranda and a hearing before the District Court, plaintiffs were awarded counsel fees and costs of suit, pursuant to 15 U.S.C. §15, in the amount of $645,250.

The judgment rendered by the District Court in petitioners' favor was affirmed in part, reversed in part and vacated in part, as follows:

(a) That portion of the judgment based on the determination that Mr. Pitchford had standing is reversed.

(b) That portion of the judgment based on the jury's verdict regarding the price fixing count is reversed.

(c) That portion of the judgment based on the exclusive dealing verdict is reversed.

(d) That portion of the judgment based on the full-line forcing verdict is reversed.

(e) That portion of the judgment based on the jury's finding of an antitrust violation and fact of damage under the territoriality count is affirmed.

(f) That portion of the judgment based on the jury's finding of amount of damage in connection with the territoriality count is vacated and remanded for further consideration of damages.

(g) That portion of the judgment relating to the award of attorney's fee is vacated and remanded for reconsideration and specific findings and analysis consonant with 15 U.S.C. §15, *Lindy,* and the subsequent cases cited above.

REASONS FOR GRANTING THIS WRIT

1. The Court of Appeals for the Third Circuit Has Been Engaged in a Systematic Destruction of the Private Antitrust Action in Contravention of the Express Policy of the Antitrust Laws.

The Court of Appeals for the Third Circuit has effectively destroyed the private action as a tool for the enforcement of the antitrust laws. Over the last 25 years, with one exception, no judgment or verdict for money damages has been passed upon and permitted to stand. Whether by way of failing to grant to plaintiffs the reasonable inferences to be drawn from the evidence, or by setting up unreasonable and unrealistic standards of proof, the Court of Appeals for the Third Circuit has effectively barred private plaintiffs from recovery. *W. L. Gore & Associates, Inc. v. Carlisle Corp.,* 1976 Trade Cas. ¶60,700 (3d Cir. 1976) (Reversing and remanding District Court's determination that one of two patents was misused, that accounting for damages be made and attorneys' fees awarded); *Ungar v. Dunkin' Donuts of America, Inc.,* 1976 Trade Cas. ¶60,763 (3d Cir. 1976) (Reversing District Court's certification of class action by requiring each franchisee to show individual coercion); *Coleman Motor Co. v. Chrysler Corp.,* 525 F.2d 1338 (3d Cir. 1975) (Jury verdict of $900,000 after trebling, judgment vacated and remanded on basis of erroneous evidence, market definition and inadequate proof); *NBO Industries Treadway Companies, Inc. v. Brunswick Corp.,* 523 F.2d 262 (3d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3345 (Nov. 26, 1975) (No. 75-770) (Jury verdict, after remittur and trebiing of $6,575,040, plus counsel fees of $248,468, judgment re-

versed and remanded on basis of inadequate jury instructions); *Three Rivers Motors Co. v. Ford Motor Co.,* 522 F.2d 885 (1975) (Reversing and remanding District Judge's finding that release was not intended to bar antitrust suit); *American Motor Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975) (Judgment entered for $4,000,000 stipulated damages, reversed and remanded on the basis that findings of national conspiracy and unreasonable restraint of trade were in error); *DeFilippo v. Ford Motor Co.,* 516 F.2d 1313 (3d Cir. 1975) *cert. denied,* 44 U.S.L.W. 3238 (Oct. 21, 1975) (No. 75-229) (Judgment for $2,250,000 plus attorneys' fees of $384,000 after verdict on special interrogatories reversed on the basis that the facts did not show group boycott); *Venzie Corp. v. United States Mineral Products Co., Inc.,* 521 F.2d 1309 (3d Cir. 1975) (Affirming judgment N.O.V. after verdict of $112,134 on the basis that concerted refusal to deal could not be found from the evidence); *Rea v. Ford Motor Co.,* 497 F.2d 577 (3d Cir.), *cert. denied,* 419 U.S. 868 (1974) (Jury verdict after trebling and remittur of $3,350,000, judgment vacated and remanded on the basis of failure to show fact of injury and causation of damages); *Lindy Bros. Builders, Inc. of Phila. v. American R. & Stan. San. Corp.,* 487 F.2d 161 (3d Cir. 1973) (Award of counsel fees vacated and remanded for failure to apply appropriate criteria); *Williams v. Independent News Co., Inc.,* 485 F.2d 1099 (3d Cir. 1973) (Affirming District Court judgment for defendant over dissent of Judge Adams who argued that the Court misapplied *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967)); *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania,* 481 F.2d 80 (3d Cir.), *cert. denied,* 414 U.S. 1093 (1973) (Affirming District Court finding that conduct was immune from anti-

trust laws and did not violate the law); *Deaktor v. Fox Grocery Co.,* 475 F.2d 1112 (3d Cir.), *cert. denied,* 414 U.S. 867 (1973) (Affirming District Court judgment for defendant that individual recovery by shareholder was not permitted and causation of damage not shown); *Hackett v. General Host Corp.,* 455 F.2d 618 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972) (Affirming District Court denial of class action status on the basis that class certification denial was not appealable and failure to permit $9.00 individual claims to proceed as class action would not sound "death knell", over dissent by Judge Rosenn); *Kauffman v. Dreyfus Fund, Inc.,* 434 F.2d 727 (3d Cir. 1970), *cert. denied,* 401 U.S. 974 (1971) (Reversing District Court ruling permitting class action to proceed on the basis that mutual fund shareholder has no personal cause of action for damage to his corporation or right to sue as class representative); *Tripoli Co. v. Wella Corp.,* 425 F.2d 932 (3d Cir.), *cert. denied,* 400 U.S. 831 (1970) (Affirming District Court granting of summary judgment against plaintiff over dissents by Judges Freedman, Seitz and Adams that insufficient facts had been established to determine whether a violation existed); *Ash v. International Business Machines, Inc.,* 353 F.2d 491 (3d Cir. 1965), *cert. denied,* 384 U.S. 927 (1966) (Affirming District Court dismissal for lack of standing on basis that minority shareholder could not sue derivatively for corporation); *Dovberg v. Dow Chemical Co.,* 353 F.2d 963 (3d Cir. 1965), *cert. denied,* 384 U.S. 907 (1966) (Affirming District Court grant of judgment N.O.V. for defendant on the basis that evidence insufficient to show conspiracy, over dissents by Judges Kalodner, Biggs and Staley); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 377 F.2d 776 (3d Cir. 1967), *rev'd,* 392 U.S. 481 (1968) (Judgment

for $4,239,609 and attorneys' fees of $650,000 vacated by Court of Appeals because of alleged inadequate calculation of damage period); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3d Cir. 1963) (District Court judgment for $12,724 plus $7,500 counsel fees reversed and remanded on basis that facts did not show price fixing conspiracy); *Gordon v. Loew's Inc.*, 247 F.2d 451 (3d Cir. 1957) (Affirming District Court opinion construing New Jersey law to bar antitrust actions as out of time); *Lawlor v. National Screen Service Corp.*, 238 F.2d 59 (3d Cir. 1956), *vacated*, 352 U.S. 992 (1957) (District Court grant of summary judgment for plaintiffs reversed and remanded by Court of Appeals on grounds *per se* violation did not exist and factual issues remained).

The Circuit Court of Appeals for the Third Circuit has treated the jury verdict in this case in a similar manner. The decision below reflects a studied disregard of the principle of law requiring all reasonable inferences to be drawn in a plaintiff's favor. The Court consistently applies a standard of proof not set forth in the decisions of this Court, other Courts of Appeals, or the legislative purpose of the Sherman and Clayton Acts.

By so doing, the Court of Appeals for the Third Circuit has deprived plaintiffs of their right to trial by jury.

2. The Decision Below Conflicts With the Decisions of This Court and Other Courts of Appeals as to the Inferences and Presumptions to Be Given a Plaintiff and the Standards of Proof Required in Private Antitrust Actions.

The Court of Appeals in its finding of the facts and application of the law to those facts is in direct conflict with the standard of review of jury verdicts as set forth by this Court in *Lavender v. Kurn,* 327 U.S. 645 (1946) and similar cases, and the role of the jury as a fact finding body as set forth in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

The Court of Appeals stated that

> There is no proof that any of the restraints were directed against Mr. Pitchford individually as a shareholder or as an officer of either Pitchford Scientific or Pitchford Manufacturing (Opinion, p. 5a).

and that

> Even if standing to sue were not questioned here, the record does not appear to contain evidence sufficient to show that PEI's alleged exclusive dealing practices obstructed the development of the Portaspec during the damage period. Indeed, Mr. Pitchford conceded that early in George Crosby's tenure as General Manager of PEI, which began in 1966, PEI approved the development of Portaspec. (Opinion, p. 5a-6a).

Mr. Pitchford did not concede this. A review of Mr. Pitchford's testimony will show that the idea to build the Portaspec was his, individually, that he personally was denied the right to design and market the product,

and that the restriction was lifted in 1968, not 1966. (R. 1012a-1013a). The fact that Mr. Pitchford subsequently chose to market his invention through Pitchford Manufacturing does not remove him from the target area as an individual. The salary paid to Mr. Pitchford as a result of sales of the Portaspec alone, after PEI finally permitted its development, is clear evidence of the measure of damage. (R. 1021a). This is not an attempt to recover lost profits of Pitchford Manufacturing.

In reversing the jury verdict in favor of the individual plaintiff, the Court of Appeals is in direct conflict with the decisions of this Court and other Circuit Courts which have recognized the right of individual plaintiffs to recover for antitrust violations directed at them. *Perkins v. Standard Oil Co.,* 395 U.S. 642 (1969); *Dailey v. Quality School Plan, Inc.,* 380 F.2d 484 (5th Cir. 1967); *Nichols v. Spencer International Press, Inc.,* 371 F.2d 332 (7th Cir. 1967). A careful reading of the Court of Appeals opinion reveals that the fact that one is also an officer, shareholder or director is presumed to limit any cause of action to that of the corporation. (Opinion, p. 6a-7a).

By applying such a standard, the Court of Appeals has added to the limitations set forth by Congress and is in conflict with the holdings of this Court that private antitrust actions are to be favored. *Radiant Burners, Inc. v. Peoples Light, Gas & Coke Co.,* 364 U.S. 656, 660 (1961); *Radovich v. National Football League,* 352 U.S. 445, 454 (1957).

Although finding that petitioners had proved PEI's price fixing policies, the Court of Appeals reversed the jury verdict for what it found to be a lack of proof of

the fact of damage during the four-year period. (Opinion, p. 9a).

This holding is in direct conflict with *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U.S. 359 (1927), *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) and *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) which recognize that a defendant shall not profit by his wrongful conduct which renders difficult the ascertainment of damages with precision.

In the case at issue, petitioners had no opportunity to prove price fixing damages on the basis of profits prior or subsequent to the illegal activity. During the period of the dealership, prices were always fixed. (R. 411a, 804a-806a). The termination of the dealership terminated petitioners' business. PEI's policy of exclusive dealing removed any opportunity for petitioners to show a similar business untainted by price fixing, and the nature of this business was such that customers were not required to notify petitioners as to why they chose to purchase another brand as opposed to PEI's products.

Petitioners did present clear and uncontroverted evidence at trial that dealers paid artificially inflated prices for PEI products. (R. 819a-820a, 831a-838a, 1632a, 1718a, Pl. Ex. 3I, 1994a, 3650a, 3652a, Pl. Ex. 4A, 1337a, 3678a-3680a, Pl. Ex. 9E, 1994a, 3751a). Dealers constantly complained to PEI about these prices and the effect upon their ability to sell. (R. 820a). Mr. Pitchford, based on his twenty-five years experience, testified that PEI's price fixing reduced both the volume and net profit which could have been attained absent price fixing. (R. 825a, 830a).

Using PEI's own documents, petitioners showed the extent of those inflated prices over competitive products. For example, a $9700 differential in price existed on the electron microscope. (Pl. Ex. 3I, R. 1994a, 3751a, Pl. Ex. 23 I, 2320a, 4224a). Petitioners sold nine such microscopes during the statutory period.

The Court of Appeals failure to find this sufficient directly conflicts with the decisions in *Hanover Shoe, Inc. v. United Shoe Machinery, Inc.,* 392 U.S. 481 (1968) and *Lessig v. Tidewater Oil Company,* 327 F.2d 459, 471 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964), where it was stated:

> Evidence that a merchant has been required to pay more for goods which he resells is sufficient to establish, prima facie, that he has been damaged; tested by common experience, such proof is adequate to "establish with reasonable probability" that profits on resale were less.

Given the admitted technical comparability of competitive products with PEI products, and given the difference in price, the holding that the fact of damage has not been proved requires of petitioners a standard of proof far beyond what this Court has held proper.

Similarly, the Court of Appeals found no evidence relating the termination of the Pitchford dealership to any price fixing plan of PEI. (Opinion, p. 9a). This result was reached in spite of the jury's express finding in IV(b) of the verdict slip that PEI's price fixing was a substantial contributing cause of the termination.

Again, the Court of Appeals determined that there was no direct evidence of enforcement of an exclusive dealing policy during the damage period. (Opinion, p. 11a). However, the Court fails to draw the logical in-

ference from the direct testimony of John O'Connor, director of marketing for PEI until *1968*, that "We wouldn't tolerate them (the dealers) representing a competitor." (R. 3138a). Rather than presuming the continuation of the illegal activity, the Court of Appeals assumes its termination in the face of evidence to the contrary.

That evidence included Mr. Pitchford's testimony (R. 702a-703a), threats to cancel the dealership if Pitchford attempted to sell competitive products (R. 721a-731a), a PEI contract dated 1969 with another dealer which provided a right of termination by PEI for handling competitive products (Pl. Ex. 4G, R. 2489a, 3688a-3695a), and a letter written by PEI in 1967 to a dealer voicing its strong opposition to the sale of competing products. (Pl. Ex. 20D, R. 393a, 3791a). It also included Mr. Pitchford's 1969 letter to PEI assuring it that it would not take on a competitive product and would adhere to the "policy" set by PEI. (Pl. Ex. 5Q, R. 985a, 3708a-3709a).

Having proved the existence of the policy, evidence of the amount of damage is readily available from the existence of artificially inflated prices for electron microscopes (Pl. Ex. 9E, R. 1994a, 3751a, Pl. Ex. 23Y, R. 2320a, 4224a), the profits which would have been made on Krautkramer products, a line which petitioners were required by PEI to give up (R. 2434a-2441a), and the readily ascertainable losses from Pitchford Scientific not being able to sell the Portaspec until 1969. (R. 1014a-1016a).

The Court of Appeals found that there was evidence that Pitchford lost sales prior to the damage period as a result of PEI's exclusive dealing practices. (Opinion,

p. 10a). However, it denied any recovery because of what it held to be a failure to cite examples of sales lost during the damage period.

In so doing, the Court of Appeals has completely disregarded this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 333 (1971).

> HRI contends, and the Court of Appeals held, that the statute permits the recovery only if those damages caused by overt acts committed during the four-year period. We do not agree.

Similarly, the Court of Appeals held that petitioners could not prevail on their tying claim (full line forcing)

> . . . absent a showing of foreclosure of competition in a substantial amount of commerce under the rule in *Northern Pacific*. (Opinion, p. 14a).

This ignores the fact that a Section 3, Clayton Act, violation was pleaded as well as Section 1, Sherman Act, and that under the former, adverse competitive effect is presumed. *Times-Picayune v. United States,* 345 U.S. 594, 606 (1953).

This holding is also in direct conflict with the rule of law set down in *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495 (1969); *Northern Pacific R. Co. v. United States,* 356 U.S. 1 (1958); and *Standard Oil Co. v. United States,* 337 U.S. 293 (1949).

Fortner, supra, citing *International Salt Co. v. United States,* 332 U.S. 392 (1947) set the test for *per se* liability as

> . . . sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not

> insubstantial" amount of interstate commerce is affected. *Fortner, supra,* at 499.

The appropriate test under *Fortner, supra,* does not require a showing of foreclosure of competition in a substantial amount. A *per se* violation can be shown where no evidence of the actual effect on competition is introduced. *Standard Oil Co. v. United States,* 337 U.S. 293, 305 (1949); *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 9 (1958).

The opinion of the Court of Appeals clearly states that petitioners' recovery is denied for failure to meet the standards set forth in *Northern Pacific R. Co. v. United States, supra.* (Opinion, p. 14a). However, *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 499-50 (1969) states:

> A preliminary error that should not pass unnoticed is the District Court's assumption that the two prerequisites mentioned in *Northern Pacific* are standards that petitioner must meet in order to prevail on the merits. On the contrary, these standards are necessary only to bring into play the doctrine of *per se* illegality. Where the standards were found satisfied in *Northern Pacific,* and in *International Salt Co. v. United States,* 332 U.S. 392 (1947), this Court approved summary judgment *against* the defendants but by no means implied that inability to satisfy these standards would be fatal to a plaintiff's case. A plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated.

Even based on an analysis of *Northern Pacific, supra,* an improper standard in this case, the decision of the Court of Appeals for the Third Circuit is in error and in conflict with the decisions of this Court and other Courts of Appeal.

In making its "not insubstantial" analysis, the Third Circuit considered only the effect on competition *vis a vis* Pitchford Scientific. (Opinion, p. 13a-14a). It did not apply the test of *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 502 (1969) that the relevant figure is the total volume of sales tied by the policy under challenge, not just the portion accounted for by the particular plaintiff bringing suit.

Using this broad analysis, the record in this case will support a finding that far in excess of $1,000,000 was affected by PEI's tying policies. (Pl. Ex. 2N, R. 1488a, 3642a-3644a). Much less has been found to meet the test of "not insubstantial" *International Salt Co. v. United States,* 332 U.S. 392 (1947).

Even if restricted to the actual effect on petitioners, the Court of Appeals is in direct conflict with *United States v. Loew's Inc.,* 371 U.S. 38 (1962), where $60,800 was found to be sufficient. While the Court of Appeals found PEI to account for 25-40% of the United States market in its product lines (Opinion, p. 12a, footnote 15), it failed to find a substantial lessening of competition. This conflicts sharply with the findings in *Standard Oil Co. v. United States,* 377 U.S. 293 (1949) where 6.7% was sufficient, *Osborn v. Sinclair Refining Co.,* 286 F.2d 832 (4th Cir. 1960), *cert. denied,* 366 U.S. 963 (1961), where 10% of the tying product was sufficient, and *Cornwell Quality Tools Co. v. C.T.S. Co.,* 446 F.2d 825

(9th Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972), where 10-15% could not be said to be insignificant.

Further evidence of this failure to take any inferences in the light most favorable to petitioners can be found in the Court of Appeals finding that the trial judge granted PEI's motion for dismissal of this cause of action (Opinion, p. 14a) when the verdict slip expressly includes it.

Again, the Court of Appeals in its analysis of petitioners' damage proof notes that

> The jury awarded Pitchford an amount that *happened* to be equal to the net value of its medical equipment business, as determined by its purchase agreement in 1972, in compensation for the termination of Pitchford's PEI dealership in 1970. (Opinion, p. 29a) (Emphasis added).

It remanded for a determination by the District Court as to the comparability of the medical dealership to the PEI dealership, and to determine whether the medical business profit figures ". . . were based on reasonably accurate business records." (Opinion, p. 31a).

Such a finding patently ignores the evidence. The evidence will show that the medical business involved the same plaintiffs and defendants. Defendants negotiated the purchase of the medical business with plaintiffs at arms-length within two years of the termination of the PEI dealership. (R. 970a-972a). Further, the products for both businesses were similar, the territories were similar, the servicemen were similar, and the customers were in many cases identical. (R. 774a, 969a-972a, 1100a, 1122a-1126a). The jury was specifically instructed on the use of a similar business as a criterion

for setting damages. (R. 3469a-3471a). Any fair reading of the evidence mandates a finding that the jury did not "happen" to award $203,000. This amount is the precise net value of the medical business. (R. 972a).

Further, the Court of Appeals was completely unjustified in raising the inference that the business records for the medical dealership were not shown to be accurate business records. All financial records for the Medical and Industrial and Scientific businesses were combined in the Pitchford Scientific financial statements and tax returns and prepared by the same Certified Public Accountant. (Pl. Exs. 23E-23L, R. 1373a, 3894a-3952a). The District Court passed on this evidence and the Court of Appeals for the Third Circuit should not substitute its judgment for that of the lower court.

These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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April 28, 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1136 and 75-1137

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION

v.

PEPI, INC. (PHILIPS ELECTRONIC INSTRUMENTS, INC., NORTH AMERICAN PHILIPS CORPORATION),

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
C.A. No. 70-1461

Argued September 4, 1975
Before: VAN DUSEN, ADAMS and HUNTER, *Circuit Judges.*

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OPINION OF THE COURT

(Filed December 24, 1975)

ADAMS, *Circuit Judge.*

Plaintiffs, a corporation that deals in scientific instruments and its president, brought an antitrust suit alleging that the practices of a manufacturer had illegally restricted their business opportunities and ultimately resulted in the termination of the dealership, causing damages to both the corporation and its president.[1] After trial before a jury, a verdict for $825,000 was returned which was trebled by the trial court, and an attorney's fee was awarded.

The manufacturer brings this appeal, asserting a series of contentions concerning the standing of the officer to sue, the proof of liability for the various antitrust violations set forth, the conduct of the trial, and the appropriate measure of damages in the event that liability was properly found. The manufacturer also complains about the amount of the attorney's fee that was awarded and about the absence of an adequate explanation of such fee.

I. BACKGROUND OF THE SUIT.

Pitchford Scientific Instruments Corporation (Pitchford Scientific), a Pennsylvania corporation, and Arthur H. Pitchford, president and holder of all but one per cent of the stock of Pitchford Scientific, are the plaintiffs in this action. Mr. Pitchford and Pitchford

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1. The causes of action were based on section 1 of the Sherman Act, 15 U.S.C. §1 (1970), and section 3 of the Clayton Act, 15 U.S.C. §14 (1970).

Scientific will both be referred to as Pitchford, except where necessary to distinguish their separate claims. The defendants are North American Philips Corporation (NAP), Philips Electronic Instruments (PEI), and Philips Electronics & Pharmaceutical Industries (PEPI).[2] All the defendants will be referred to as PEI.

PEI markets three lines of sophisticated electronic instruments for industrial and scientific use: scientific and analytical, industrial, and medical. The alleged antitrust violations arose from Pitchford's handling of the scientific-analytical and industrial lines under an annual dealership contract with PEI. The dealership contract contained a clause allowing PEI to cancel the arrangement at any time, upon thirty days' notice to Pitchford. PEI exercised this option, and the Pitchford dealership came to an end on September 10, 1970.

In its complaint, filed December 24, 1970, Pitchford claimed that PEI had violated both the Sherman and Clayton Acts by policies designed to implement price fixing, exclusive dealing, full-line forcing, and territorial sales restraints. The plaintiffs asserted that such conduct caused injury to them while Pitchford Scientific acted as a dealer for PEI and, further, resulted in the eventual termination of the dealership.[3]

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2. PEI is a division of NAP. At the beginning of this action, PEPI was a subsidiary of NAP, but since that time has merged into NAP.

3. Pitchford also alleged fraud and unconscionability with regard to the dealership agreement and its termination. The trial court entered a separate order granting a directed verdict to PEI on these counts, and that order has not been appealed.

Trial began on February 26, 1974, and in response to special interrogatories a verdict against PEI was returned on March 29, 1974. The verdict of $825,000 was divided as follows: $550,000 was awarded to Pitchford Scientific for the counts dealing with price fixing, full-line forcing, exclusive dealing, and territorial restrictions;[4] $72,000 was awarded Mr. Pitchford for substantially the same violations, and $203,000 was awarded Pitchford Scientific for damages resulting from the termination of the dealership. The $825,000 figure was trebled by the trial judge to $2,475,000.

On June 26, 1974, the court denied PEI's motions for a judgment notwithstanding the verdict and for a new trial. The court then awarded plaintiffs an attorney's fee in the amount of $645,250. On November 20, 1974, the trial judge denied PEI's motion for alteration of this award.

PEI appeals on six grounds:

1. It was entitled to a directed verdict because Mr. Pitchford lacked standing to sue as an individual, Pitchford failed to prove PEI's liability for price fixing, exclusive dealing, full-line forcing, or territorial restraints, and there was no proof that the cancellation of the Pitchford dealership was related to any of the alleged antitrust violations.

2. In any event, PEI is entitled to a new trial because Pitchford introduced prejudicial material, improper hearsay, and inadmissible opinion evidence. In addition, PEI urges that a new trial is necessary since a considerable portion of the questioning by Pitchford's

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4. There was no specific allocation among these counts.

counsel regarding price-fixing was deliberately misleading and because Pitchford's counsel made improper remarks in his opening and closing arguments.

3. The evidence introduced by Pitchford on its lost profits and the value of the terminated dealership was improper.

4. The inclusion of the full-line forcing count in the special interrogatories to the jury was improper, since the count had been dismissed by the judge during the trial.

5. The charge was inadequate to guide the jury in properly applying the relevant law to the facts of the case.

6. The award of counsel fees was excessive and a proper predicate for such fees was not set forth.

In response, Pitchford contends that we should sustain the judgment based on the jury's verdict and uphold the award of attorney's fees.

We affirm in part, reverse in part, vacate in part, and remand.

II. Mr. Pitchford's Standing to Sue.

At trial Mr. Pitchford claimed that he was entitled to damages, because of income that he had lost as a result of the various restraints by PEI on Pitchford Scientific. Mr. Pitchford also sought to recover the salary he lost as president of another firm, not a party to this action, Pitchford Manufacturing. It was alleged that from 1962 to 1968 PEI obstructed the development by Pitchford Manufacturing of Portaspec, a product Mr. Pitchford was eager to place on the market. In addition

to the award to Pitchford Scientific, the jury awarded $72,000 to Mr. Pitchford for his personal claims.

On appeal, Mr. Pitchford contends that, even without considering the Portaspec issue, he would be justified in recovering an amount "at least equal to his average annual earnings of $57,000 per year between 1967 and 1970." Mr. Pitchford does not point to anything in the record to justify this particular measure of damages.

PEI, however, asserts that Mr. Pitchford had no standing to sue and that, consequently, the jury award to Mr. Pitchford as an individual was improper. Since the record indicates that PEI's business was conducted with Pitchford Scientific and not with Mr. Pitchford personally, any injury under the alleged violations, PEI argues, was suffered by that corporation alone.

There is no proof that any of the restraints were directed against Mr. Pitchford individually as a shareholder or as an officer of either Pitchford Scientific or Pitchford Manufacturing. Consequently, any harm to Mr. Pitchford would have to flow derivatively from injuries done the companies of which he was a shareholder and an officer.[5]

This Court has adopted the precept that "the language [in section 4 of the Clayton Act] does not include indirect harm that the individual may have suffered

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5. Even if standing to sue were not questioned here, the record does not appear to contain evidence to show that PEI's alleged exclusive dealing practices obstructed the development of Portaspec during the damage period. Indeed, Mr. Pitchford conceded that early in George Crosby's tenure as General Manager of PEI, which began in 1966, PEI approved the development of Portaspec.

as a stockholder through injury inflicted upon the corporation.[6] As this Court noted as early as 1910:

> Certainly it is not apparent that [the Sherman Act] was intended or did confer upon hundreds of thousands of stockholders individual rights of action when the wrongs could equally well and more economically be redressed by a single unit in the name of the corporation.[7]

Hence, Mr. Pitchford in his capacity as shareholder is without standing.

A denial of standing applies with equal force to Mr. Pitchford in his status as an officer of Pitchford Scientific.[8] Mr. Pitchford alleged that his salary as president of the firm was less than it would have been had the firm been able to market electronic instruments free of the restrictions imposed by PEI. Mr. Pitchford cannot, however, obtain standing merely by shifting from his shareholder pocket to his officer pocket.

Moreover, salaries of corporate officers are not necessarily tied to corporate profits; other factors may weigh in the balance. To permit suits by officers for salaries lost in consequence of antitrust violations on

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6. Kauffman v. Dreyfuss Fund, Inc., 434 F.2d 727, 732-34 (3d Cir. 1970), *cert. denied,* 401 U.S. 974 (1971); Ash v. International Bus. Mach. Corp., 353 F.2d 491 (3d Cir. 1965), *cert. denied,* 384 U.S. 927 (1966).

7. Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).

8. *See* Vermilion Foam Products v. General Electric Co., 386 F.Supp. 255 (E.D. Mich. 1974) (dictum). *Cf.* Harrison v. Paramount Pictures, Inc., 115 F.Supp. 312, 316 (E.D. Pa. 1953), *aff'd per curiam,* 221 F.2d 405 (3d Cir. 1954).

the basis of facts such as were presented here would open the door to conjectural damage claims. Mere assertion of a relation between corporation losses and officers' salaries without more does not provide the foundation necessary to establish standing to sue. If his salary as president is not simply the reverse side of his earnings as principal shareholder of the company, any reduction in his salary attributable to PEI's practices is too far removed along the casual chain to entitle Mr. Pitchford to standing.

The same reasoning applies to Mr. Pitchford's standing as an officer of Pitchford Manufacturing. While the corporation might have a cause of action on the basis of the facts alleged here, the corporation's president can have no standing to sue in these circumstances.

Accordingly, based on the facts present here, Mr. Pitchford is without standing to sue as an individual, and all portions of the judgment granting recovery to Mr. Pitchford personally must be reversed.

III. Pricing Policy.

PEI's pricing policy was formulated by a committee consisting of its director of marketing, its chief financial officer, and its general manager. The committtee promulgated a price list for sales of PEI's products to the public by its dealers and company-owned branch outlets, and a code indicating a discount at which the dealers could purchase the equipment from PEI. If, for a particular transaction, a dealer considered that the specific discount was not sufficient to make the sale profitable, the dealer could request a sales allowance beyond the normal discount.

Publishing list prices and establishing a program under which dealers may obtain extra discount, PEI argues, is perfectly proper. Mr. Pitchford, however, testified that PEI not only issued a suggested list price, but also exercised extensive control over prices. Any variance by a dealer from the list price, Mr. Pitchford stated, required approval by the pricing committee. Mr. Pitchford's testimony was supported by a PEI document, mailed to dealers and branches in 1969, which stated that any deviation by the dealer from the list price was to be approved by at least one member of the pricing committee.

There was evidence that PEI enforced its pricing policy. In connection with a sale to the Magee-Women's Hospital in 1969, Pitchford requested permission to sell below PEI's list price. According to Mr. Pitchford, PEI's director of marketing, Robert Deichert, was "very emphatic that under no circumstances could [Pitchford] cut the price." Deichert finally agreed that Pitchford would sell at list, and then make a separate grant to the hospital. PEI proceeded quietly to pay Pitchford a portion of the grant. Although Pitchford was not permitted to sell a line of Pye Unicam equipment at less than list price, a subsequent sale of such equipment to the Magee-Women's Hospital was consummated when Pitchford agreed to supply the hospital certain spare parts at no cost.

Sufficient evidence was presented to support a finding by the jury that PEI's pricing policies constituted a violation of section 1 of the Sherman Act. If there is no applicable fair trade legislation, resale price maintenance

is *per se* illegal.[9] The only way a supplier such as PEI may permissibly influence resale prices is by an announcement of its preferred retail pricing policy. A supplier may not go beyond such an announcement to control the retail pricing practices of those to whom it passes dominion and control over its goods.[10]

The memorandum defining the role of PEI's pricing committee indicates that the committee's purpose was not only to supervise branch sales prices but to supervise dealer sales prices as well. The pricing committee policed both branch and dealer practices in the same manner, and PEI's intention with respect to the Magee-Women's Hospital sales could reasonably have been perceived to be that any Pitchford price concession not undermine PEI's list price policy. Accordingly, there was enough evidence for the jury to find the intent requisite to the antitrust violation.[11]

A plaintiff, however, must establish both that the antitrust laws were violated and that it has suffered "fact of damage" in consequence of that violation in order to establish a cause of action in a private antitrust suit.[12] There is not enough evidence here to sustain the

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9. Keifer-Stewart Company v. Joseph E. Seagrams & Sons, Inc., 340 U.S. 211 (1950). There is no evidence in the record that PEI's equipment came under any fair trade legislation.

10. United States v. Parke Davis & Co., 362 U.S. 29 (1960); Von Kalinowski, Antitrust Laws and Trade Regulation §67.02(2) (1972).

11. *Compare* Rea v. Ford Motor Co., 497 F.2d 577, 590 (3d Cir.), *cert. denied,* 419 U.S. 868 (1974).

12. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 113-14 (1969); Rea v. Ford Motor Co., 497 F.2d at 589.

jury's finding that during the four-year statutory damage period[13] there was damage from such a violation.

As the Supreme Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, "the burden of proving fact of damage under section 4 of the Clayton Act is satisfied by proof of some damage flowing from the unlawful conspiracy . . . ."[14] It would have been sufficient if the wrongful acts had a tendency to injure Pitchford's business and if there had been introduced evidence of a decline in the value of Pitchford's profits that was not shown to be attributable to causes other than the antitrust violation. Pitchford, however, conformed to PEI's policies and there was no evidence relating the termination of the Pitchford dealership to any price-fixing plan of PEI. Nor was there sufficient evidence that Pitchford lost net profits because of PEI's pricing policies.*

Accordingly, Pitchford failed to sustain its burden of proving fact of damage with respect to the price-fixing cause of action, and the trial judge improperly denied PEI's motion for judgment notwithstanding the verdict on this count.

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13. 15 U.S.C. §15b (1970). In the present case this period began on December 24, 1966 and ended on December 24, 1970.

14. 395 U.S. at 114 n.9.

*The original opinion read "Nor was there any evidence that Pitchford lost sales or profits because of PEI's pricing policy." This sentence was amended to read as set forth above by order of the Court dated February 6, 1976.

IV. Exclusive Dealing.

Although there is evidence that Pitchford lost sales prior to the damage period as a result of PEI's exclusive dealing practices, the evidence of injury to Pitchford in this respect during the damage period is ambiguous at best.

The most critical evidence in this regard is the following: Chester Robards, a Cleveland PEI dealer who was terminated, testified that he had been told sometime after 1967 that PEI was beginning to carry a line of equipment that would compete with a line he already carried, and that he was advised by PEI to give up the competing line. In June 1969, PEI executed a dealership agreement with VWR, PEI's West Coast dealer, providing that the handling of competing lines by VWR during the period of the agreement would be ground for termination. Aiso, Pitchford introduced a deposition of John O'Connor, director of marketing at PEI until 1968; O'Connor indicated that PEI had no policy with respect to its dealers representing companies aside from PEI, "other than the obvious conflict of interest type understandings . . . we wouldn't tolerate them representing a competitor." Thus, there is evidence that the policy of not permitting PEI dealers to represent a competitor was in effect for at least a portion of the damage period

A memorandum dated November 1969, from George Crosby, the General Manager of PEI, to Robert Cavanaugh, the Vice President of PEI, concerned Pitchford's handling of a medical line supplied by another division of NAP. Crosby wrote:

> While our dealers are independent businessmen . . . ., the facts are that they are essentially salesmen with

> one year contracts and we should demand the same performance from them that we do from our own sales force. I would fire one of my own salesmen if he casually announced that he was distributing other product lines, but in the past we have assumed there is nothing wrong with a dealer announcing to us that he now represents other companies (e.g., Pitchford taking on the medical x-ray line). I have told our dealers [we] don't care how they run their business, as long as their performance continues to be acceptable for PEI . . . but when performance deteriorates, we feel an obligation to get into the details of their activities just as we do in the case of a PEI salesman with a deteriorating performance . . . . It is very obvious that Arthur wants us to get off his back . . . I doubt very much that this latest flareup will result in our terminating Arthur Pitchford as a dealer but I would like to make known to him that the decision to terminate the dealer-relationship . . . is based upon poor performance.

There was no direct evidence that PEI enforced an exclusive dealing policy that prevented Pitchford from taking on competing lines of equipment during the damage period. The Crosby-Cavanaugh memorandum indicates merely that Crosby had a predilection to treat dealers in a fashion similar to branch salesmen. Pitchford's evidence about opportunities relinquished prior to the damage period is useful to establish a pattern of violation. There is some validity to Pitchford's argument that PEI's attitude about exclusive dealing prior to the damage period and its exclusive dealing

approach to other dealers made it clear to Pitchford that the assumption of competing lines was futile.[15]

The evidence of injury to Pitchford because of PEI's alleged policy of exclusive dealing was, however, insufficient. Indeed, Mr. Pitchford testified that he could not cite any examples of sales that were missed because of exclusive dealing practices by PEI during the damage period.

Pitchford's failure to prove any lost opportunity within the damage period is fatal to its claim on this count, because a plaintiff may not succeed in a private antitrust cause of action unless it shows fact of damage.[16]

V. FULL-LINE FORCING.

Mr. Pitchford testified that during the damage period his organization was coerced into taking on the Pye Unicam line and the Torr X-Ray unit. He stated that, because of its poor quality and lack of profitability, he did not want to sell the Pye Unicam items. Two other employees of Pitchford also testified to the reluctance of Pitchford to distribute this line. However, Mr. Pitch-

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15. Pitchford did not show the mischief that any PEI exclusive dealing practices might inflict on commerce. PEI accounted for 25 to 40 per cent of the total United States market in each of its product lines and thus occupied a powerful economic position, but there was no evidence about which lines of commerce were substantially affected by Pitchford's inability to handle them. Under section 3 of the Clayton Act, exclusive dealing arrangements are illegal only if they foreclose competition in a substantial share of a line of commerce. Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

16. *See* note 12 *supra* and accompanying text.

ford stated that he was "afraid not to take on the line" for fear of cancellation of his dealership agreement.

To demonstrate injury by the forcing of the Pye Unicam products, Pitchford introduced evidence that it spent $15,814 for the initial equipment, approximately $1,400 for a trailer to haul the equipment, and $5,000 to pull the trailer. Pitchford also adduced testimony that it needed a full-time salesman to sell Pye Unicam equipment in 1968, and that in 1969 time equivalent to that which one salesman would provide was expended marketing this item. The orders booked in a year by these efforts to sell the Pye Unicam equipment were approximately one-seventh of those of an average Pitchford salesman.

The Torr unit was also undesirable, according to Mr. Pitchford, because he felt a competitor of PEI made a better, lower-priced X-ray. Robards testified that all PEI dealers were informed that "they were expected to buy one of [the Torr units]." Presumably the purchase of a demonstration unit was preparatory to marketing the unit for PEI.

Full-time forcing is a violation of the antitrust laws only if the effect of such forcing "may be to substantially lessen competition . . . in any line of commerce."[17] In order to establish such a transgression, it must be shown that the seller had economic power in the market for the forcing item and that a substantial amount of commerce relating to the forced item was foreclosed.[18]

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17. 15 U.S.C. §14 (1970).

18. *See* Northern Pacific R. Co. v. United States, 356 U.S. 1, 6 (1958); Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 498-99 (1969).

In *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, a tying case, the Supreme Court indicated that the seller's economic power need not be a "monopoly or even a dominant position" in the market for the tying or forcing product; economic power would be sufficient for proof of a violation if the seller imposed the restraint "with respect to any appreciable number of buyers. . . ."[19] With regard to the amount of commerce in the forced product that must be foreclosed in order to prove a violation, the Court in *Fortner* described that $200,000 was not an "insubstantial" amount of commerce.[20]

Although Pitchford produced evidence of forcing by PEI with regard to the Pye Unicam and Torr equipment and although Pitchford's expenditures in connection with this equipment constitute the necessary fact of damage, Pitchford adduced no evidence that PEI's full-line forcing practices had any substantial effect on competition in any line of commerce. Regardless of the manufacturer's economic power, there can be no liability under a full-line forcing count absent a showing of foreclosure of competition in a substantial amount of commerce under the rule in *Northern Pacific*.

The trial judge appears to have agreed with this evaluation of the evidence, because near the conclusion of the trial he granted PEI's motion for a dismissal of this cause of action. Nonetheless the full-line forcing issue was included in the special interrogatories to the jury,[21] which returned a verdict that may have been

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19. 394 U.S. at 502-04.

20. *Id.* at 402.

21. The full-line forcing count was left in an ambiguous procedural status. After the court "tentatively [sustained]" PEI's motion to dismiss the full-line forc-

based in part on this count. Since there had been a failure to prove an essential element of this claim, however, there was no foundation for submission of the question to the jury.

Accordingly, that portion of the judgment based on the jury's verdict with respect to full-line forcing will be reversed.

VI. Territorial Restrictions.

A. *Factual Background.*

PEI chose Pitchford in 1945 to be its first dealer in the United States. Pitchford's office was in Pittsburgh, Pennsylvania, but PEI at first authorized Pitchford to sell anywhere in the United States. Beginning in 1955, however, territorial clauses were inserted in Pitchford's annual dealership agreements. These clauses explicitly precluded Pitchford from selling outside the specified territory. PEI agreed not to assign more dealers to the designated territory, but it reserved the right to deal directly with federal and state governments and national accounts within the assigned territory. Pitchford was to receive full commission credit for sales by PEI to such government or business accounts. Over a period of time, Pitchford's territory was steadily reduced by PEI, despite attempts by Pitchford to have it enlarged.

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ing count, a notation that the count had been dismissed was entered in the docket. Nonetheless, the full-line forcing count was submitted to the jury in special interrogatories and in the judge's charge to the jury, despite entry and despite references by the trial judge and Pitchford's counsel during the discussion of the jury charge indicating that it was understood that the full-line forcing count had been dropped. Because we reverse the judgment based on the full-line forcing count on its merits, it is unnecessary to decide the procedural questions surrounding this count.

In the late 1960's, PEI re-evaluated its distribution system and gradually replaced dealerships in particular territories with branches; these branches were part of the PEI organization. As a result, dealerships in the District of Columbia, Ohio, Illinois, and California were eliminated. Pitchford was terminated in 1970, and by the conclusion of the trial there were only two PEI dealerships remaining in the country.[22]

Under PEI's policy, sales by a dealer outside its territory diverted at least a portion of the sales commission to the dealership or branch that had jurisdiction over the area where the buyer was located. PEI intervened at the behest of various dealerships and branches to settle disputes over commissions and territories.

In addition, there appear in the record instances of the enforcement, just prior to and during the damage period, of PEI's policy to discourage all extraterritorial sales. Thus, Robards, president of the Cleveland dealership that was terminated, testified to a telegram sent by PEI approximately eight months prior to the beginning of the damage period. The telegram concerned the installation by Robards of equipment outside his territory.

> It is against Philips policy to have dealers contact prospects in other dealer territories without prior notification to dealer involved. . . . It is directly opposed to the Philips dealer franchise to accept orders for equipment to be installed in other dealer territories. . . . As a result full dealer discount and quota credit involved in aforementioned [sale] . . . will be assigned to . . . the [dealer in territory where buyer is located].

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22. Testimony that the move to direct branch selling is an industrywide trend was uncontradicted.

Pitchford contended that PEI's policy to discourage sales by a dealer outside its territory continued during the damage period.[23] In this regard, Pitchford introduced a letter sent by PEI in January, 1967 that threatened to terminate Robards' dealership because of sales made by Robards outside his territory.

A controversy erupted in 1969 between a branch salesman of PEI and VWR Scientific, the PEI West Coast dealer, over their competition for a sale of Pye Unicam equipment to a Texas college. The salesman's complaint prompted a letter from the sales manager, G. L. Dienes, to VWR:

> Phelan states he increasingly is running into [VWR] sales activity [in his territory] . . .
>
> I am also attaching recent correspondence from Pye Unicam alleging [VWR] trying for Unicam business in Taiwan.
>
> Ted, this extra-curricular activity on the part of your sale representatives speaks well for their aggressiveness. *However, I would appreciate it if you would investigate these two situations and let me know what plans you have for eliminating this inter-competition in the future.* (emphasis supplied)

Deichert, PEI's director of marketing, received a copy of the Dienes letter, but raised no objection to the sentiments expressed in it.

In 1971, Dienes' successor sent another letter to VWR Scientific, questioning a sale by VWR in North Dakota, an area assigned to PEI's Chicago branch. A

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23. *See* note 13 *supra*.

copy of this inquiry also passed over the desk of PEI's director of marketing without comment or correction.

Further, there is evidence that, in cases where a prospective customer asked for bids from various PEI dealerships in order to obtain the best price, PEI encouraged the dealers outside the territory of the customer to quote prices higher than the home dealer. A request for bids from an Hawaiian hospital was forwarded by PEI to its dealers around the country with this suggestive paragraph attached:

> [VWR, the home dealers] have been in continuing contact with [the hospital] and, of course are in a position to provide service in Hawaii. *We assume that other dealer organizations will be forced to quote additional monies for the travel expenses associated with installation of* [the equipment] *in the islands.* This is, of course, a matter of personal concern for individual dealer offices. (emphasis supplied)

The evidence of enforcement of territorial restrictions against Pitchford itself during the damage period is wholly circumstantial. In 1964, however, prior to the damage period, Pitchford was denied the commission on an order by a U.S. Steel plant in Gary, Indiana, which was outside Pitchford's territory. Evidence was presented about several other potential sales by Pitchford that were all thwarted by PEI's territorial policies, but these potential sales also appear to have arisen prior to the damage period.

Nonetheless, Pitchford claims that the Robards and VWR experiences reflected a continuing territorial allocation program by PEI. The President and General

Manager of PEI, George Crosby, testified that the advent of his tenure in 1966 saw no change in PEI's territorial policies. Thus, urges Pitchford, the evidence supports the inference that the policies that prevented the Pitchford sales prior to the commencement of the damage period were still in force during the damage period.

PEI, however, insists that its territorial arrangement is reasonable, and exists primarily to assure proper installation and maintenance of its sophisticated and "hazardous" product. It asserts that no violation could be possible under the territorial restriction count "because of the critical importance of service and installation in the ability to successfully conduct business." Indeed, PEI maintains that Pitchford sustained a benefit from the territorial policy because Pitchford was under no compulsion from PEI to overextend its "meager" service staff by selling beyond its territory. PEI claims that the territorial limitation was so in keeping with Pitchford's capabilities that "in the last four or five years of its distributorship, 'Pitchford never made' any real efforts to make sales outside its territory." Finally, PEI contends that the Pitchford dealership profited from the territorial system because direct sales by PEI into the Pitchford territory generated full commissions for Pitchford, amounting to 21 per cent of its sales in 1969.

B. *Violation.*

In *United States v. Arnold Schwinn & Co.*, a manufacturer's practice of restricting its dealers to sales in prescribed territories was held to constitute a vertical restraint and a *per se* violation of the Sherman Act.[24]

24. 388 U.S. 365 (1967). *See* United States v. Topco Associates, Inc., 405 U.S. 597, 608 (1972); Eastex Aviation, Inc. v. Sperry & Hutchinson Co., — F.2d— (5th Cir. 1975).

The *Schwinn* rule forbids a manufacturer from enforcing restraints limiting a distributor's customers, either by geographic sales boundaries or otherwise, if the manufacturer has surrendered dominion and control over its product. Because there is evidence that Pitchford purchased PEI's goods for resale, the jury could properly have found that PEI had surrendered dominion and control to Pitchford.

Both prior to and during the damage period, PEI wrote to Robards, VWR, and other PEI dealers objecting to violations of PEI's territorial allocation. There was a termination threat to Robards during the damage period, at least partially attributable to his violation of PEI's territorial policy. PEI's termination of many dealers, its use of warnings to dealers, Pitchford's experience with PEI's territorial policy prior to the damage period, and the evidence that there was no change in PEI policy during the damage period, would enable a jury to find that PEI enforced its territorial policy during the damage period.

If a manufacturer cannot impose a vertical division of markets, neither can it police a division of markets for the benefit of horizontal competitors.[25] This Court in *American Motor Inns, Inc. v. Holiday Inns,* held that a chain of motels could not permissibly enforce territorial entry restrictions which gave existing franchises a veto over entry of any new franchises nearby.

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25. United States v. Topco Associates, 405 U.S. 596 (1972); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975). *See also* Anderson v. American Automotive Assoc., 454 F.2d 1240, 1244, 1246 (9th Cir. 1972).

In the present case, there is evidence that PEI responded to branch and dealer complaints about sales made without regard to the territorial allocation and actively sought to prevent entry by one dealer into another dealer's territory. If an extra-territorial sale was consummated, the selling branch or dealer had to surrender all or a portion of its commission to the branch or dealer having jurisdiction over the customer's place of business. In addition, the record reveals an explicit agreement between PEI and each dealer to divide territories. Thus, a horizontal restraint, a *per se* violation of the Sherman Act, could be found on this record, even if the *Schwinn* prohibition of vertical restraints were not dispositive.

PEI seeks to avoid the impact of the *per se* rule against vertical and horizontal restraints by arguing, first, that the facts of this case show only a vertical restraint and second, that, because of the circumstances here, a court must apply a rule of reason analysis similar to that employed in *Tripoli Co. v. Wella Corp.*[26] In *Tripoli* this Court applied a rule of reason approach to restraints on distributor sales because the restraints there were found necessary to prevent injury to inexpert users of professional hair care solutions. PEI argues that the restraints here were essential to assure cutomers of adequate service by the dealer who had sold them the instruments. But, unlike the situation in *Tripoli,* PEI has not offered any evidence to show that if PEI's territorial restraints were removed there would have been a danger of public injury similar to that suggested in *Tripoli.*

Nor does PEI, as it contends, come within the exception to the *per se* prohibitions found in *United States*

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26. 425 F.2d 932 (3d Cir. 1970).

v. Jerrold Electronic Corp.[27] In *Jerrold,* Judge Van Dusen, then a district court judge, found an exception to the *per se rule* prohibiting the tying of products and services when such tying is essential to the introduction of a new product under conditions of technological uncertainty. Judge Van Dusen characterized that case as a "rather unique situation."[28] In this case, which involved terrritorial restrictions rather than a product-service tying arrangement, PEI alleged that Pitchford was not providing adequate service. There was no evidence, however, that the territorial restraints employed by PEI were necessary to the initial success or failure of an industry with an uncertain and developing technology. Even assuming that the *Jerrold* exception applies equally to product-service tying and territorial restraints, no evidence was produced to sanction an exception to the *per se* rule in this case.

Here there is evidence of territorial restrictions imposed by the manufacturer, there is no basis for employing a rule of reason analysis, and the case does not fall within an exception to the general rule prohibiting territorial restraints by a manufacturer. Accordingly, the jury could properly have found a violation of section 1 of the Sherman Act.

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27. 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

28. *See* Copper Liquor, Inc. v. Adolph Coors, 506 F.2d 934, 944 (1975) (quality control rationale for imposing vertical territorial restraints insufficient to allow exception to *per se* rule).

C. *Fact of Damage.*

In order to establish a cause of action for territorial restrictions, it must be demonstrated that there was an anti-trust infraction and that the plaintiff has suffered "fact of damage" in consequence of that infraction.[29] Hence, Pitchford must show with "reasonable certainty" some injury to the dealership in consequence of the territorial restrictions imposed by PEI.[30]

PEI is correct in noting that there was no representation of a specific instance during the damage period when Pitchford lost sales or profits because of PEI's territorial policy. Pitchford introduced evidence, however, that (1) PEI was enforcing its territorial policy prior to and during the damage period, requiring commission reduction for extra-territorial sales and threatening the termination of at least one dealership because of violation of the policy; (2) Pitchford was denied three sale possibilities prior to the damage period because of PEI's territorial policies; (3) during the damage period Pitchford was required to sign an agreement with explicit territorial restrictions in order to continue its dealership; (4) Pitchford had the capability during the damage period to make sales beyond its assigned territory; and (5) from 1960 and into the damage period Pitchford had unsuccessfully attempted to have its territory expanded.

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29. Rea v. Ford Motor Co., 497 F.2d 577, 589 (3d Cir.), *cert. denied,* 419 U.S. 868 (9174).

30. Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 958 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960). *See* Story Parchment v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); Deaktor v. Fox Grocery Co., 475 F.2d 1112, 1116-17 (3d Cir. 1973).

In addition, Pitchford produced witnesses and exhibits to show that, had it been permitted to compete in an expanded territory it would have made additional sales, even considering competition from other PEI branches and dealers. After accounting for the costs and taxes that would necessarily accompany such an increased gross revenue, Pitchford would still have made an additional profit from the lost sales, according to the calculations of its witness.

This evidence was more than mere conjecture.[31] The jury might reasonably have concluded that PEI's policy of restricting dealers to limited territories had been applied directly to Pitchford during the damage period when PEI denied Pitchford's request that its territory be expanded. The jury might also have reasonably concluded that being confined to an assigned territory caused Pitchford to lose sales it might otherwise have made.

It is not sufficient to show fact of damage by mere speculation or guesswork. But, in the circumstances of this case, it would be unduly harsh to require Pitchford to document each sale that it might have made had it contravened the PEI territorial policy and attempted to do business outside its restricted territory during the damage period. The jury could have credited the expert testimony adduced by Pitchford and could have found that Pitchford lost some profits by virtue of the loss of sales attributable to the territorial restrictions imposed on it by PEI.

Thus, it would have been inappropriate for the trial court to grant PEI's motion for a judgment n.o.v. with

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31. *Compare* Deaktor v. Fox Grocery Co., 475 F.2d at 1116-17.

respect to the territorial restriction count. The disposition of this count, however, depends upon the resolution of PEI's assertions respecting trial error.

VII. TRIAL ERRORS.

PEI raises a number of claims regarding conduct during the trial, the opening and closing arguments of counsel for Pitchford, and the charge to the jury. It was urged that these errors require that any portion of the case which survives PEI's motion for a judgment n.o.v. be reversed and remanded for a new trial. Therefore, these contentions would apply only with respect to liability for the territorial restriction cause of action, since all other issues of liability have been decided in favor of PEI, and since, as will appear below, the matter of damages must be remanded in any event.

The errors to which PEI objects fall into three categories. The first group concerns evidence. PEI alleges that testimony regarding activities in the 1940's and 1950's, substantially before the damage period, was irrelevant and likely to be confusing to the jury. This same objection is also made to evidence regarding the relations between PEI and various European corporations. In addition, Pitchford is alleged to have elicited hearsay and improper opinion testimony about the territorial restrictions on the dealership.

Arguments by Pitchford's counsel at the opening and close of the case are the basis for the second class of objections by PEI. PEI avers that these arguments were prejudicial by reason of misstatements of fact, misstatements of law, reliance on matters not of record, allusions to nonproduction of witnesses despite the fact that the deposition testimony of such witnesses had

been admitted into evidence, and appeals to passion. PEI is particularly concerned by a reference that compared PEI officials with Germans during the Nazi period, and by repeated employment of the image of small dealers beset by the unspecified nefarious practices of American industry.

The final class of objection relates to the charge to the jury. PEI contends that the instruction on territorial restrictions was erroneous and inadequate because it confused horizontal and vertical restraints and because it failed to consider all the elements of the offense. In addition, the charge is said to be improper since the jury was told that it could draw inferences from the nonproduction of evidence without instruction about witnesses whose testimony had been introduced by deposition. The charge also misled the jury by improperly comparing the antitrust laws to the tort of negligence and, PEI asserts, prejudiced the jury by a statement that "there is a strong human temptation to yield to the desires for profits" which often leads businessmen to "practices that happen to be illegal."

Although it goes without saying that great care must be exercised to assure that prejudicial and confusing evidence be eliminated or kept to a minimum, we cannot say that the admission of the evidence protested here rises to the level of reversible error. In a case of this nature, it is not irrelevant for the plaintiff to introduce evidence regarding the historic development of the alleged violations, although the plaintiff must show, of course, that there was a violation of the law within the statutory damage period. So far as the territorial restriction count is concerned, the evidence implicating PEI's European connections was included only inci-

dentally in the context of evidence apposite to PEI's termination of the Pitchford dealership. The objections to hearsay and opinion evidence relating to the same count, although not lacking in merit, do not require reversal in the circumstances of this case. The evidence in question tended to reinforce Mr. Pitchford's testimony, but because his testimony was also corroborated in other ways the hearsay and opinion testimony may be regarded as primarily cumulative. In a long and complex case, such error does not constitute grounds for ordering a new trial.[32]

The opening and closing remarks by Pitchford's counsel may have from time to time approached the margins of impropriety. However, with respect to the territorial restriction count in particular, there are no improper references in the arguments that would merit the declaration of a mistrial. The general tone of the opening and closing arguments and the specific references to "Germany in 1941" and to "corporations that treat the law with utter and complete disrespect and disregard . . ." were immediately qualified with statements to the effect that "this is a far less heinous crime [than the attitude that prevailed in Germany in 1941], and I don't mean to imply in any way that they are comparable . . ." and "the great bulk of [corporations] do everything they can to abide by the law. . . ." References to the criminal aspects of the antitrust laws were qualified by statements that the present case was a civil one.

Counsel ought not invoke horrors such as Nazi Germany, indulge in a polemic about large corporations

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32. *See* United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944); Gerhart v. Henry Disston and Sons, Inc., 290 F.2d 778, 786 (3d Cir. 1961).

generally when the issue is the behavior of one particular manufacturer, or allude in a civil suit to criminal laws that are in no way implicated in that action. We cannot say, however, that the arguments here, given their ambience, actually crossed the bounds of the impermissible.[33]

Nor does the charge to the jury require a reversal and remand for a new trial on the issue of liability with regard to the territorial restriction issue. Although the instructions regarding territorial restraints were not as adequately detailed as they might have been, these errors do not appear to be critical. This is so because of our determination that liability for a per se violation could be found in this case on either a vertical restraint theory or a horizontal restraint theory.[34]

The charge relating to the non-production of evidence was not unfair. Considered in its context, the charge would not suggest to the jurors that the failure to produce witnesses in person when their depositions had been offered in evidence is a foundation for an adverse inference. PEI cannot be said to have been prejudiced by the instruction on this matter.

Comparing antitrust law to negligence, while misleading, was not significant when the entire charge is considered, as it must be. The reference to "the strong human temptation to yield to the desires for profit" was included in a prolonged digression on the origins of the antitrust laws, and was not aimed with particularity at

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33. *But compare* Foster v. Crawford Shipping Co., 496 F.2d 788 (3d Cir. 1974); Robinson v. Pennsylvania Railroad Co., 214 F.2d 798 (3d Cir. 1954).

34. *See* F.R. Civ. P. 61. *Cf.* Williams v. Independent News Co., 485 F.2d 1099, 1106 (3d Cir. 1973).

the defendants. In these circumstances it does not appear that this comment would unduly prejudice the jury.

Thus, there is no basis for granting a new trial with respect to the territorial restriction count. In view of this determination and the previous conclusion that it would be inappropriate to grant a judgment n.o.v. with respect to this count, the portion of the judgment based on the jury's finding of an antitrust violation and fact of damage under the territoriality count will be affirmed.

VIII. Measure of Damages.

The jury found losses to Pitchford Scientific of $550,000 and $203,000—each amount being predicated on multiple violations of the antitrust laws. The special interrogatories did not require the jury to specify the amount of damages attributable to each violation. Because of our resolution that, as a matter of law, no liability was proved on the counts relating to price fixing, exclusive dealing, and full-line forcing, the question of damages in this case must be remanded for reconsideration. The only count on which the finding of liability has been affirmed is the territorial restriction count, and on remand damages solely with respect to that issue must be ascertained.

PEI, however, makes several objections to the methods of calculation of damages that were employed at the first trial. A number of these objections are relevant to the determination of damages stemming from the territorial restrictions, and we shall consider them in order that error may be avoided when damages are reconsidered on remand.

Pitchford attempted to estimate the additional profits it would have gained from an expanded territory, had it not been for the restriction and ultimate termination of its dealership. Pitchford's expert began by calculating Pitchford's share of all PEI sales in the United States. This figure was then applied to PEI orders-booked and sales in the expanded territory, including the states adjacent to Pitchford's restricted territory. An adjustment was made to account for competition from other PEI outlets in the projected area. The resultant figure was said to represent Pitchford's likely sales in the enlarged territory. From this hypothetical sales figure, the profits lost by Pitchford were computed.

PEI objects to this projection for two reasons. Initially, PEI contends that the expert's expansion of Pitchford's old territory was without foundation in the record. Instead, Pitchford's expert arbitrarily enlarged the territory to include all states adjacent to Pitchford's assigned territory, although there were already several PEI branches and dealers in such states, and insufficient account was taken of the expanded staff that Pitchford would need to maintain its share of PEI sales in a larger territory.

Second, the calculation for the expanded territory produced a total profit for Pitchford sales in both its actual territory and in the hypothetical additional territory. According to PEI, the failure to deduct Pitchford's actual sales for the years 1967-1970 results in an overstated estimate of Pitchford's losses.

PEI also argues that in calculating incremental profits, Pitchford's experts used the sales and orders-booked figures inconsistently from year to year, that one of the orders-booked figures was grossly inaccurate,

and that the figures used to compute Pitchford's lost profits are not representative of Pitchford's overall costs.

The next group of contentions focuses on the value of Pitchford Scientific at its termination. PEI asserts that there was no damage in fact to the going-concern value of the Pitchford dealership because termination by PEI did nothing to undermine the goodwill of the dealership which might have been continued by Pitchford with alternative product lines. Further, to the extent that goodwill was founded on dealing in PEI's equipment, any goodwill that Pitchford possessed must have been conditioned upon PEI's right to cancel under the annual dealership contract.

In this connection, PEI maintains that, even if Pitchford has been deprived of the goodwill value of its dealership, the calculation of the loss from that deprivation was incorrect. This is so because the salary of Mr. Pitchford was not included as a cost of operation of the dealership when potential earnings by Pitchford Scientific were projected. This omission artificially inflated earnings, it is contended, and resulted in an overstatement of projected profits. Moreover, PEI asserts that despite its objections the trial court permitted the use of calculations on the loss of going-concern value that were invalid for failure to exclude from such loss the assets retained by Pitchford at the termination of its PEI dealership. PEI objects also that there was no foundation for the capitalization rates used to compute the estimated going-concern value of the Pitchford dealership.[35]

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35. The capitalization rates employed in three exhibits introduced by Pitchford ranged between 10% and 20%.

PEI's final disagreement with the computation of post-termination damage is the use of the price paid for Pitchford's medical equipment business. The jury awarded Pitchford an amount that happened to be equal to the net value of its medical equipment business, as determined by its purchase agreement in 1972, in compensation for the termination of Pitchford's PEI dealership in 1970. PEI claims that the medical equipment business was not comparable to the dealership under consideration here, and that there is no evidence in the record that indicates any such similarity. Therefore, the value of the medical equipment business, maintains PEI, was irrelevant and misleading in estimating the value of the terminated dealership. More importantly, PEI charges that the valuation of the medical equipment business was grounded not on documents kept in the regular course of business, but on documents prepared *post litem motam.*

The contentions by PEI are not uniformly meritorious: PEI's challenge to Pitchford's expansion of its territory in the damage exhibit must fail. If the jury could reasonably have found that Pitchford was denied sales by virtue of PEI's territorial restrictions and that the dealership was terminated in connection with the illicit territorial policy of PEI, it could consider evidence estimating Pitchford's losses as a result of the PEI practices. There was evidence that Pitchford could have made sales beyond its territory; the extent of such hypothetical sales was necessarily an estimate. Whether the estimate of Pitchford's lost profits was overly generous—expanding Pitchford's territory beyond Pitchford's sales capacity—is a matter that concerns the weight of the evidence, not its admissibility. As such, it is a question for the jury to consider.

In addition, PEI's claim that no goodwill was lost by Pitchford because of termination is without basis in the circumstances of this case. Pitchford could have built up substantial goodwill over the years while handling PEI products. That the annual dealership contract could be cancelled on thirty days' notice would not necessarily vitiate such goodwill and Pitchford, or its hypothetical purchaser, could have had a justifiable expectation that there would be no cancellation of the dealership in violation of the antitrust laws.

A number of PEI's arguments, however, have substance. In particular, a plaintiff cannot recover its loss more than once. The salary of Mr. Pitchford should have been treated as a cost of operation in the data employed to project potential earnings for the purpose of evaluating the lost going-concern value of Pitchford.[36] The failure to deduct Mr. Pitchford's salary as an expense of the dealership artificially inflated earnings and made the profit extrapolation inaccurate. The same principle applies as well to any assets retained by Pitchford after

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36. Eastman Kodak v. Southern Photo Co., 273 U.S. 352, 376 (1927); Coleman Motor Co. v. Chrysler Corp., — F.2d —, — n. 20 (3d Cir. 1975); Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 886 (1st Cir. 1966); Chiplets, Inc. v. June Dairy Products Co., 114 F. Supp. 129 (D. N.J. 1950) (patent abuse).

Assuming that Mr. Pitchford earned the salary by the contribution of services necessary to the dealership's operations, anyone purchasing the dealership would have to expend an approximately equal amount to hire a replacement for Mr. Pitchford, and the earnings from ownership of the concern would have to be reduced by that much. If Mr. Pitchford did not contribute services equal in value to the "salary" he drew as president of the company, then he was not being paid a salary but was drawing a dividend due the owner.

termination; these assets should have been subtracted from the estimate of value lost in consequence of termination. Similarly, Pitchford may not recover, in the guise of estimated lost profits from hypothetical operations, profits that it had already earned within its accustomed territory.[37]

We do not decide the other issues raised by PEI with respect to damages, but on remand the district court should determine whether the medical supply business and the PEI dealership are reasonably comparable and, if they are, whether the profit figures of the Pitchford medical equipment business were based upon reasonably accurate business records. Only a similar business would provide a basis for a jury's consideration of damages on the termination count.[38]

In addition, every effort should be made to avoid inconsistent or inaccurate use of the sales and orders-booked figures. When considering the estimated, or *pro forma,* constructions of incremental sales from expanded territories, care should be taken that all reasonable costs of an expanded sales capacity are included and that competition from other PEI branches and dealers is properly weighed in the calculations.

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37. Albrecht v. Herald Co., 452 F.2d 124 (8th Cir. 1971), *rev'd on other grounds,* 390 U.S. 145 (1968); Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 62 (1st Cir. 1970).

38. Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 82 (1st Cir. 1970); William Goldman Theatres, Inc. v. Loew's, Inc., 69 F. Supp. 103, 109 (E.D. Pa. 1946), *aff'd,* 164 F.2d 1021 (3d Cir.), *cert. denied,* 334 U.S. 811 (1948).

IX. The Award of Attorney's Fees.

Pitchford applied to the trial court for an award of an attorney's fee based on 3,270 hours devoted to the litigation by counsel and valued at $138,763.[39] Pitchford also sought expenses of $17,349. In a summary order the trial judge awarded $645,250 as an attorney's fee plus costs—over four times the sum set forth in Pitchford's application. In his order the trial judge cited *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.,*[40] but did not adduce any explanation for the amount of the award.

The principles of *Lindy* are applicable to an award of attorney's fees pursuant to 15 U.S.C. §15,[41] although *Lindy* itself involved an award under the equitable fund doctrine. The specific application of these principles in each case must be explained by the district court when it orders the award of attorney's fees. Because the explicit findings and analysis required by *Lindy* were not explicated, we are compelled to return the case to the trial court.

When considering this issue on remand, the trial court should be guided by the standards set forth in *Lindy*. It must take into account (1) the hours expended by counsel which contributed to the recovery; (2) the reasonable value of counsel's time, usually counsel's normal hourly billing rates; (3) the 'contingent nature of success' in the action, and (4) the quality

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39. *See* 15 U.S.C. §15 (1970).

40. 487 F.2d 161 (3d Cir. 1973).

41. NBO Industries v. Brunswick Corp., 523 F.2d 262, 279 (3d Cir. 1975). *See* Merola v. Atlantic Richfield Co., 493 F.2d 292, 298 (3d Cir. 1974).

of the work performed. The judge's evaluation of the quality of the services is to be made in light of what he has been able to observe, the amount of the recovery, and the complexity of the issues in the controversy.[42]

The *Lindy* case involved a fee that was awarded from a fund which counsel had obtained for the benefit of a class. *Lindy* is, to that extent, different from the present suit, in which the award to Pitchford for the costs of its lawyers is to be paid by the defendant. An award from an equitable fund based on the "contingent nature of success" in the action would reflect somewhat the normal practice in contingency fee arrangements: Counsel is paid out of the damage award in a measure proportionate to the hazards of the case. Where attorneys are paid from an equitable fund or by a contingency fee the defendant does not bear the cost incurred by the plaintiff in proceeding with the action, but under section 15 the antitrust defendant may be required to pay an award for attorney's fees as well as an award for damages.

Merola v. Atlantic Richfield Co.[43] applied the *Lindy* principles to a situation like the one presented here, since in *Merola* there was a specific agreement that the attorney's fee was to be fixed by the court and paid by the defendant. The opinion of Chief Judge Seitz in *Merola II* is instructive with respect to the application of the "contingent nature of success" concept, set forth in *Lindy,* to cases where the losing defendant must pay a reasonable fee for plaintiff's cost of counsel.

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42. 487 F.2d at 166-169.

43. 493 F.2d 292 (3d Cir. 1974) *(Merola I), on appeal from the decision on remand,* 515 F.2d 165 (3d Cir. 1975) *(Merola II).*

This "contingent nature of success" factor, like the quality of work factor, is a consideration that provides the trial court with flexibility in its computation of the fee award.[44] The focus of the court's attention is to be the objective standard provided by the hours expended by counsel and the reasonable hourly rate of compensation for each attorney involved. The court may then justify deviation from the resultant figure if such is warranted by the success of the action despite a substantial likelihood of failure at the outset, or by the particularly high or low quality of counsel's work.

The contingency fee agreement entered into by plaintiff and its counsel is distinct from the "contingent nature of success" concept as employed in *Merola II*. It would seem to be a questionable policy under 15 U.S.C. §15 for courts to enforce against a defendant whatever contingency fee arrangements have been entered into by a plaintiff and its counsel,[45] because such a policy might encourage unrealistic agreements and result in excessive counsel fees. The opinion in *Merola II* indicates that this Court has not adopted a policy lacking sensitivity to this problem.

If plaintiff and its counsel have made a prior agreement respecting a contingency fee that would not be completely satisfied by the award of a reasonable attorney's fee pursuant to section 15, the unsatisfied portion of the contingency fee could then be paid out of the award for damages that has been obtained. It would appear improper to require a defendant to bear whatever costs its opponent's private arrangement would im-

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44. 515 F.2d at 168.

45. In this case Pitchford and his counsel had a 25 per cent contingency fee arrangement.

pose. Under 15 U.S.C. §15 the defendant may not be obliged to pay what the court determines to be a reasonable fee for the legal services provided to plaintiff in the case at issue.[46]

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46. *See* Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 859 (8th Cir.), *cert. denied,* 396 U.S. 942 (1952); In re Gypsum Cases, 386 F. Supp. 959, 984 (N.D. Cal. 1974); Gossner v. Cache Valley Dairy Ass'n, 307 F. Supp. 1090 (D. Utah 1970).

X. CONCLUSION.

The judgment of the district court will be affirmed in part, reversed in part, and vacated in part, as follows:

(a) That portion of the judgment based on the determination that Mr. Pitchford had standing will be reversed.

(b) That portion of the judgment based on the jury's verdict regarding the price fixing count will be reversed.

(c) That portion of the judgment based on the exclusive dealing verdict will be reversed.

(d) That portion of the judgment based on the full-line forcing verdict will be reversed.

(e) That portion of the judgment based on the jury's finding of an antitrust violation and fact of damage under the territoriality count will be affirmed.

(f) That portion of the judgment based on the jury's finding of amount of damage in connection with the territoriality count will be vacated and remanded for further consideration of damages.

(g) That portion of the judgment relating to the award of attorney's fee will be vacated and remanded for reconsideration and specific findings and analysis consonant with 15 U.S.C. §15, *Lindy*, and the subsequent cases cited above.

The cause will be remanded to the district court for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 75-1136/7

ARTHUR H. PITCHFORD and PITCHFORD
SCIENTIFIC INSTRUMENTS CORPORATION

vs.

PEPI, INC. (PHILIPS ELECTRONIC
INSTRUMENTS, INC., NORTH AMERICAN
PHILIPS CORPORATION),

Appellants

(D. C. Civil Action No. 70-1461)

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, ADAMS and HUNTER, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered in orders of November 20, 1974 and December 12, 1974 be and the same is hereby affirmed in part, reversed in part, and vacated in part, as follows:

(a) That portion of the judgment based on the determination that Mr. Pitchford had standing is reversed.

(b) That portion of the judgment based on the jury's verdict regarding the price fixing count is reversed.

(c) That portion of the judgment based on the exclusive dealing verdict is reversed.

(d) That portion of the judgment based on the full-line forcing verdict is reversed.

(e) That portion of the judgment based on the jury's finding of an antitrust violation and fact of damage under the territoriality count is affirmed.

(f) That portion of the judgment based on the jury's finding of amount of damage in connection with the territoriality count is vacated and remanded for further consideration of damages.

(g) That portion of the judgment relating to the award of attorney's fee is vacated and remanded for reconsideration and specific findings and analysis consonant with 15 U.S.C. §15, *Lindy,* and the subsequent cases cited above.

The cause is remanded to the district court for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

December 24, 1975

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

Nos. 75-1136 and 75-1137

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION

v.

PEPI, INC. (PHILIPS ELECTRONIC INSTRUMENTS INC., NORTH AMERICAN PHILIPS CORPORATION),

Appellants

Sur Petition for Rehearing En Banc

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

s/ ARLIN M. ADAMS
Circuit Judge

Dated: January 30, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1579

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
Petitioners

v.

PEPI, INC., PHILIPS ELECTRONICS INSTRUMENTS INC. and NORTH AMERICAN PHILIPS CORPORATION,
Respondents

Respondents' Brief In Opposition To Petition For Certiorari

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1579

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
Petitioners

v.

PEPI, INC., PHILIPS ELECTRONICS INSTRUMENTS, INC. and NORTH AMERICAN PHILIPS CORPORATION,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED*

The Questions Presented in the Petition for Writ of Certiorari are inappropriate. Question one is simply impertinent. Question two is not "expressed in the terms and circumstances of the case" as is required by Rule 23(c) Supreme Court Rules. It would appear from the argument

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* Respondents herein have filed a Petition for Writ of Certiorari at No. 75-1518. The questions presented in that petition are separate from the questions raised by petitioners herein.

advanced for granting the writ that petitioners intended to raise three separate issues under question two. These issues would appear to be:

1. Whether an individual who is the president and principal shareholder of a corporate dealer organization has standing to sue where it is alleged that anticompetitive restraints imposed on the corporate dealer caused another corporation (also owned and managed by the individual plaintiff) to pay a lower salary to the individual plaintiff?

2. Whether the court below followed appropriate standards of appellate review in a private antitrust case where it reviewed the record and concluded that plaintiff had failed to introduce sufficient evidence to establish; (a) any injury resulting from alleged price fixing, (b) any injury from alleged exclusive dealing, and (c) a violation of §3 of the Clayton Act?

3. Whether the court below failed to follow appropriate standards for appellate review when it remanded part of the case for retrial on the issue of damages?

STATEMENT OF THE CASE

The Statement of the Case in the petition contains a correct summary of certain events prior to the trial and sets forth accurate quotations from the verdict slip from the jury and from the order entered by the Court of Appeals. In part 2 of the Reasons for Granting the Writ, the petitioners have also made numerous assertions of fact. Many of these assertions, however, are inaccurate, incomplete or misleading. Accordingly, some additional statement is required to clarify several of the more serious of these errors in the petition.

On the issue of price fixing petitioners asserted that they had presented "clear and uncontroverted evidence at trial that dealers paid artificially inflated prices for PEI

products." (Petition p. 15) Petitioners then summarized their position by stating:

> "Given the admitted technical comparability of competitive products with PEI products, and given the difference in price, the holding that the fact of damage has not been proved requires of petitioners a standard of proof far beyond what this Court has held proper." (Petition p. 16)

The facts, however, are to the contrary. The portions of the record cited by the petitioners demonstrate merely that in some of its product lines, the respondents made and sold scientific instruments like the electron microscope which were more expensive than those made by other manufacturers. Indeed, respondents' electron microscope was referred to as the "Cadillac" of the industry. (R. 1632a) There was no citation to the record to support the statement as to the "technical comparability of competitive products with PEI products." Indeed, the record would show that technical differences existed between the various manufacturers' equipment. Finally, the references to price differences are totally misleading. All of the dealers who sold respondents' products purchased equipment at the same price as the petitioners. The references to the record all cite differences in prices with respect to equipment sold by other manufacturers. Such differences between various manufacturers' product lines are the same differentials which one encounters between different makes of automobiles. (R. 605a-606a) Thus there is absolutely no evidence that the respondents imposed inflated prices on the petitioners.

Petitioners have played fast and loose with the record and even with the opinion of the court below throughout their petition. Another example of this can be found in petitioners' presentation with respect to the issue of

exclusionary dealing. Petitioners asserted with respect to the opinion of the court below on this issue that:

> "Rather than presuming the continuation of the illegal activity, the Court of Appeals assumes its termination in the face of evidence to the contrary." (Petition p. 17)

This is not an accurate reading of the opinion of the Court of Appeals. The Court did not assume that a policy of exclusive dealing "terminated," rather the Court of Appeals found that the evidence of injury was insufficient. In fact, the Court of Appeals relied specifically on the testimony of Mr. Pitchford (R. 983a) that he could not cite any examples of sales which were lost because of the alleged exclusive dealing practices. (Opinion 14a)

It is important to keep in mind the fact that the principal issue raised in the appeal to the United States Court of Appeals for the Third Circuit was a lack of proof of the necessary elements for recovery in a private treble damage action. As a result, the attention of the Court of Appeals was directed to the entire record. Extensive briefs were filed by both parties, lengthy oral argument was permitted, and supplementary memoranda were solicited from counsel. All of the arguments concerning the record and the inferences which might be drawn from the record contained in the petition for certiorari were reviewed previously by the Court of Appeals.

THERE ARE NO REASONS FOR GRANTING THE WRIT

The first reason advanced for granting the writ is impertinent and does not require a response. While the characterizations of prior opinions from the United States Court of Appeals for the Third Circuit are often grossly incorrect, a rebuttal might lend undeserved dignity to an

improper argument.* Suffice it to say that the office of the writ of certiorari is to grant review of a decision which raises matters of great importance and not to review earlier decisions of the same court of appeals.

The approach which petitioners have taken in part 2 of the Reasons for Granting the Writ is fundamentally unsound. The facts and the cases have been distorted in an effort to create an impression that some real issues may exist warranting appellate review. Some of the distortions are patently obvious while others require a more detailed review of the opinion of the Court of Appeals.

It is obvious that Mr. Pitchford does not have standing to sue for alleged lost salary from a corporation (Pitchford Manufacturing) which allegedly was impeded from introducing a new product by reason of restraints imposed upon the plaintiff dealer organization (Pitchford Scientific Instruments Corporation).**

Likewise, petitioners' reliance on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and

* Petitioners view that the Court of Appeals "has effectively destroyed the private action as a tool for the enforcement of the antitrust laws" (Petition p. 9) is apparently not shared by others. 109 private antitrust actions were filed in 1974 in district courts within the Third Circuit. Only the Second, Fifth and Ninth Circuits had more private antitrust actions filed in that year. *Annual Report of the Director of the Administrative Office of the United States Courts (1974)*, pp. 397-402.

**In addition to the fact that permitting such a remote party to recover damages involves a serious risk of duplicative recoveries, see *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), the evidence of this issue was so speculative that it would not justify an award of damages. While the district court admitted this testimony, it recognized the conjectural nature of this testimony by stating: "I suppose it would be as if the Philips' policy prohibited him from going to horse races or playing poker at conventions, and he lost a lot of profit thereby." (R. 1020a)

Lessig v. Tidewater Oil Company, 327 F.2d 459 (9th Cir. 1964) *cert. den.* 377 U.S. 993 (1964), is inappropriate in this case. *Hanover Shoe* involved a claim against a monopolist which insisted on leasing equipment rather than selling it. *Lessig* involved a claim that the plaintiff had been forced to pay more for branded TBA products than he would have paid had he been permitted to buy the same brand of products from another party. In the present case there is no monopoly and the plaintiff paid the same price for respondents' products as any other dealer would have paid.

Finally, petitioners have misstated this Court's opinion in *Times-Picayune v. United States*, 345 U.S. 594 at 606 (1953). In that opinion the Court did not state that "adverse competitive effect is presumed" in a section 3 Clayton Act case. Instead, the opinion pointed to *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922) as holding:

> ". . . that a seller occupying a 'dominant position' in the shoe machinery industry, without more, violated §3 of the Clayton Act by contracts tying to the lease of his machines the purchase of other types of machinery and incidental supplies." 345 U.S. at 606.

A review of the opinion of the Court of Appeals on the price fixing issues reveals that petitioners' reliance on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), has no justification. In the present case the Court of Appeals recognized that no lost sales had been shown during the four years prior to the filing of the complaint. It concluded that there had not been a showing of "sufficient evidence that Pitchford lost net profits because of PEI's pricing policies." (Opinion 11a) Thus the record in this case is different than the record in *Zenith*. In *Zenith* the district court had found that damages had occurred during the four years immediately prior to the filing of the complaint. The issue before this Court was whether all of those damages could be recovered

if some of them were as a result of overt acts committed prior to the four-year period of recovery permitted by the statute of limitations. In the present case, since no damages occurred during the four-year period covered by the statute of limitations, it is clear that no recovery can be had.

In its lengthy and exhaustive opinion the Court of Appeals expressly recognized that "the burden of proving fact of damage under §4 of the Clayton Act is satisfied by proof of some damage flowing from the unlawful conspiracy." Citing the earlier *Zenith Radio* opinion found at 395 U.S. 100 (1969) the Court of Appeals then went on to state:

> "It would have been sufficient if the wrongful acts had a tendency to injure Pitchford's business and if there had been introduced evidence of a decline in the value of Pitchford's profits that was not shown to be attributable to causes other than the antitrust violation." (Opinion 11a)

Clearly this standard of review gave petitioners liberal opportunity to show that they had introduced evidence to sustain a jury verdict.*

Since the Court of Appeals applied a standard of review which could not possibly have infringed upon the legal rights of the petitioners, it is clear that the real thrust of this petition is to ask this Court to undertake a *de novo* review of all of the evidence. This type of request presents no substantial federal question for the consideration of this Court.

Finally, that portion of the petition which is addressed to the action of the Court of Appeals in remanding for a

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* In the Petition for Writ of Certiorari filed at No. 75-1518 respondents have indicated that the Court of Appeals was too lenient in the standards which it imposed in determining whether any injury had occurred as a result of the alleged territorial market foreclosure.

determination of damage is not the type of issue which should be considered on certiorari. The Court of Appeals remanded for a new trial on damages for several reasons (see Opinion 31a, 35a-36a) only one of which involved a question as to the evidence of the sale of allegedly comparable business. Since other reasons exist for ordering a new trial on the issue of damages, there is no reason for granting review on the issue raised by the petitioners.

CONCLUSION

The policy of the Court is to grant writs of certiorari in cases involving principals of fundamental importance or where a conflict exists as to the law. Respondents submit that the present petition raises no important question as to federal law and involves no conflict of decisions requiring action by this Court. The Court of Appeals for the Third Circuit reviewed the factual record at trial against a liberal standard which favored the petitioners. This Court should not undertake a *de novo* review of the record under those circumstances. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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